PLENITUDE HOLDINGS SDN. BHD.

v.

TAN SRI KHOO TECK PUAT & ANOR.

HIGH COURT, JOHOR BAHRU
DATO' P.S. GILL J.
[CIVIL SUIT NO 22-32-89]
25 MARCH 1994

CONTRACT: Breach of contract - Assessment of damages - Housing project not taking off due to breaches of undertakings by defendants - Claim for loss of profit on housing project - Method of computation of loss - Plaintiff and defendants computing loss of projected profits differently - Which method to be adopted - Claim for loss of opportunity cost - Whether should be allowed - Whether increase in value of land could offset damages suffered by plaintiff.

The plaintiff had obtained judgment against the defendants for damages for breach of contract. The defendants' appeal to the Supreme Court was dismissed. This is the proceeding relating to the assessment of the plaintiff's damages.

Held:

[1] Both PW1 and DW1 admit that there would be a valid claim by the plaintiff for loss of profit if the project had commenced in 1988. They differ only in the amount of profit. Notwithstanding the fact that both PW1 and DW1 gave evidence that there would be a valid claim by the plaintiff for loss of profit if the housing project commenced in 1988, in terms of experience, PW1 had more practical experience of the housing industry than DW1. Having seen and heard both PW1 and DW1 giving evidence in Court, the testimony of PW1 relating to the loss of profits on the housing project was preferable to that of DW1.

[2] There have been two different computations in regard to the loss of profits made by PW1 and DW1. Taking all factors into consideration, an average of the two figures relating to the basis that the project started in 1987/88 amounting to RM19,113,500 should be the loss of profits on the housing project. However, bearing in mind that there could be adverse conditions affecting the anticipated profits, a deduction of a reasonable percentage of 30% should be applied to the sum and the plaintiff is accordingly awarded a sum of RM13.5 million as damages for loss of profit.

[3] Both PW1 and DW1 agreed that there was a loss in regard to cash flow investment but differed as to the amount. In the circumstances the plaintiff should be awarded a sum of RM867,969, being the average of the two figures quoted by PW1 and DW1, under this head of damages.

[4] On the evidence there was no basis for the plaintiff's claim under the heading of loss of opportunity cost of RM2,869,300 and this item was accordingly disallowed. The plaintiff's claim for future profits amounts to a claim for exemplary damages against the defendants. The plaintiff has not established their claim in accordance with the principles in *Rookes v. Barnard* [1974] *AC 1129* and therefore their claim for RM5,000,000 under this head was disallowed.

[5] The defendants' submission that the increase in the value of the land would offset any damage suffered by the plaintiff is not supported conclusively by the evidence of DW2 as DW2's opinion was based on a series of assumptions and there was therefore no degree of certainty that the value of the land stated by him could be arrived at on a reasonable and factual basis.

[6] There was no evidence before the Court as to the actual increase in the value of the said land between 1984 and 1992 which left the Court to speculate on the increased value of the said land. To do so would be totally unsatisfactory, bearing in mind that there was no evidence before the Court of the fact that there were any prospective purchasers for the said land and further bearing in mind that the plaintiff had purchased the land for the purpose of development, and not for sale.

[7] The plaintiff was entitled to interest of 8% per annum on the 10% of the purchase price, paid by way of deposit, commencing from the date the agreement was wrongfully terminated by the defendants till the balance of the purchase price was paid by the plaintiff to the defendants.

[Orders accordingly].

Cases referred to:

Hadley v. Baxendale [1854] 9 Ex. 341
Bank Bumiputra Malaysia Bhd. v. Mae Perkayuan Sdn. Bhd. [1993] 2 MLJ 76
Rookes v. Barnard [1974] AC 1129

Legislation referred to:
Civil Law Act 1956, s. 11
Contract Act 1950, s. 74
Rules of the High Court 1980, O. 42 r. 12

For the plaintiffs - Wong Kim Fatt (Lee Fei Fung with him); M/s Gulam & Wong
For the defendants - Porres Royan (Robert Lai with him); M/s Jackson & Mascarole

JUDGMENT

P.S. Gill J:
This application for assessment of damage is being made pursuant to an order made by me in my judgment delivered at the conclusion of the trial. The brief facts of the case are that by a sale and purchase agreement dated 20 August 1984 the second defendant, Rumah Nanas Estate Sdn. Bhd. agreed to sell to the plaintiffs, Plenitude Holdings Sdn. Bhd., a piece of Estate land at price of RM47,939,958. The plaintiff paid a deposit of RM4,793,995.80 but failed to pay the balance sum within the stipulated period of contract, or within the extended completion period. The second defendant then terminated the said agreement and forfeited the said deposit.

Having heard all the evidence I came to the conclusion that the termination of the contract by the second defendant was not valid and ordered specific performance of the contract for the sale and purchase of the land in question. The defendants appealed against my judgment and the Supreme Court dismissed the defendants' appeal and affirmed my judgment.

In my judgment I held that the first defendant on his own volition and acting for and on behalf of the second defendant had promised to secure a loan for the plaintiffs and that in the event that such a loan was not secured, the first defendant had given an undertaking that the defendants would join the plaintiffs in a joint venture scheme to develop the land. The Court granted the plaintiffs the remedy of specific performance of the sale and purchase agreement with the damages to be assessed and paid for by the defendants to the plaintiffs, for wrongful termination of the agreement, and for breaches of their undetakings with costs. For easy reference, the relevant order of the Court dated 8 April 1993 reads as follows:

> [5] The second defendants shall pay to the plaintiffs damages to be assessed for wrongful termination of the said agreement dated 20 August 1984 with costs.
>
> [6] The first and second defendants shall pay to the plaintiffs damages to be assessed for breaches of their undertakings with costs.

The consequences of a breach of contract are governed by s. 74 of the Contract Act 1950 which states as follows:

> 74. [1] When a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which natually arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.
>
> [2] Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

Any loss of profit normally to be expected which the developer would otherwise have earned, but for the breach and delay caused, is an allowable claim under the rule in *Hadley v. Baxendale* [1854] 9 Ex. 341.

The plaintiffs claim that their loss of profit and damages arose out of and was directly caused by the breaches of undertakings by both the defendants. As such, the defendants knew of the consequences of the breach of contract as they were fully aware that the plaintiffs had purchased the land for the purpose of development.

At this trial, the plaintiffs called Mr. Song Chap Fah as their witness. He had also filed two affidavits dated 28 April 1993 and 22 June 1993. The defendants also filed an affidavit denying that they were liable for the claims made against them. Their affidavit was sworn by a director of the company Madam Rahmah binti Haji Jaafar and it was dated 17 June 1993. Apart from the affidavits filed by the defendants, the defendants called two witnesses namely Lim Wooi Hwee and Mr R. Parampathy.

The plaintiffs claim for damages is for wrongful termination of the agreement, breaches of undertakings, loss of profit on the housing project, and interest on the deposit of RM4,793,995.80. This amount was the 10% deposit paid by the plaintiffs to the second defendants towards the purchase price of the land in question.

In regard to the claim under wrongful termination of the agreement, I would allow the following items on the ground that the plaintiff has

submitted sufficient proof by submitting the relevant invoices.

(I) Fees Payable to the following

[i] Ling & Wong Perunding Sdn. Bhd. amounting to RM31,000.
[ii] Jurukur Selatan amounting to RM31,783.50

I disallow all claims in regard to the following items:

[iv] Lim & Hooi amounting to RM22,500.
[v] Cost paid to Gulam & Wong amounting to RM348,651.
[vi] Outstanding costs payable to Gulam & Wong amounting to RM700,000.

I now deal with the plaintiffs' claim under the heading of breaches of undertakings. The principal claim under this category is a claim for loss of profit on the housing project.

It must be borne in mind that the Court made a finding of fact at the conclusion of the trial that the first defendant had promised to secure a loan for the plaintiffs and in the event such a loan was not secured, the first defendant had given an undertaking that the defendants would join the plaintiffs in a joint venture scheme to develop the said land.

The plaintiffs allege that as a result of the undertaking by the first defendant and the failure of the defendants as a whole to either secure a loan for the plaintiffs or enter into a joint venture scheme with the plaintiffs, the plaintiffs have suffered a loss of profit on the housing project.

It is reasonable to assume that the defendants were aware of the fact that by not honouring their undertakings, the plaintiffs would be unable to proceed with the development of the land and thereby suffer loss of profit on the proposed housing project.

In regard to the quantum of damages, the plaintiffs' witness Mr. Song Chap Fah [PW1], stated in his evidence that the housing project involved the construction of houses on the 1000 acres of land that the plaintiffs had contracted to purchase from the second defendants. The housing project was to be named Pekan Yayasan. The land was projected to develop into five phases comprising of 11,547 housing units of various types, as well as sales of land for industrial purpose. In pursuance of their intention to develop the said land, the plaintiffs had obtained the services of various persons, such as surveyors, engineers, project managers, and other technical personnel in order to prepare for the conversion, sub-division and the preparation of the layout plan of the said land in question.

The final layout plan was approved in 1987. The plaintiffs genuinely proceeded with their plan to develop the said land on the strength of the undertakings given by the defendants. This fact was not denied by the defendants. PW1 was undoubtedly a competent and an experienced witness to give evidence on behalf of the plaintiffs. PW1 stated that in 1987 the necessary approvals were obtained for the development of the land into a housing scheme. He also stated that 1987 was the perfect time to embark development of the land into a housing scheme.

Sometime in the middle of 1987, the plaintiffs and the defendants after some discussions agreed to implement a joint venture scheme between the respective parties. The plaintiffs would hold a 10% share in that scheme and the defendants would hold a 90% share.

As the plaintiffs had a 10% share in the joint development scheme with the defendants, the profits derived from the scheme would accordingly be 10% of the total gross profit before tax. PW1 stated that the total sales revenue projected by him was RM645,935,000. The total expenditure projected was RM421,625,000 and the gross profit before tax would amount to RM224,300,000. The plaintiffs' share of profit would amount to 10% x RM224,300,000 or RM22,430,000.

The defendants called a witness Lim Wooi Hwee [DW1]. She stated that she was a Certified Public Accountant and was attached to a firm of accountants since 1979. She had prepared a report in regard to her findings which was marked as D4. In her evidence and her report, she stated that if the project had commenced in 1988, the profit of the plaintiffs would be RM15,797,000, and this would be the loss of profit of the plaintiffs.

Before the Court comes to any definite conclusion as to the veracity and reliability of the evidence given by PWl and DW1, it is appropriate to examine the reasons given by the two witnesses for their respective conclusions.

PW1 stated that apart from being a Certified Accountant he was also a Cost Accountant familiar with the accounts and financial position of the plaintiffs company, and had prepared the financial papers himself in 1989. Apart from being an accountant, he also had considerable experience in the housing industry. He had been involved in a large housing project named Taman Skudai Baru in Johor Bahru for a period of four years prior to 1989. This project involved about 840 units. PW1 had relied on his experience and personal knowledge in preparing his reports, apart from the fact that he was in Johor Bahru for a large number of years prior to 1989, and therefore had ample opportunity to have a first-hand knowledge of the conditions prevailing in the housing industry.

DW1 stated in her evidence that she was a Certified Accountant having assisted Receivers and Managers in supervising some abandoned housing projects. In Johor she was involved in the revival of a project named Taman Mewah in Senai. This project involved a total number of 107 units. In preparing her computation and figures regarding the cost and construction of building, DW1 admitted in her evidence that she had no personal knowledge of the construction or building cost and that she had prepared her report on the findings supplied to her by quantity surveyors and architects whose evidence was not before the Court. DW1 stated further that she did not go into a very detailed computation, although she claimed that she had adequate time. The report D4 although claimed to be prepared by DW1 was signed by the firm.

DW1 had also assumed that the plaintiffs suffered a loss due to the delay in the commencement of the project. She failed to base her report on the fact that the plaintiffs were claiming damages for breaches of undertakings on the part of the defendants as stated earlier.

DW1 used what she referred to as a "comparison" approach. According to her, if the project had commenced in 1993 then the plaintiffs' profits would have been higher than if the project had commenced in 1988. As such, the plaintiffs would not have suffered any loss.

This "comparison" approach is not without flaws for the following reasons. DW1 admitted under cross-examination that there was no reason for the plaintiffs to delay the commencement of the project from 1988 to 1993. She also stated that she was not saying that the project if delayed until 1993 would have earned better profits. She admitted in her evidence that all projections are not precise. If there was a recession, the profit would be less, and if there is a civil unrest the property market would collapse, thereby causing the plaintiffs financial disaster. In making her computation for 1993 DW1 assumed that the cost of building the houses remained constant for 8 years without taking into account the increase in building costs. She admitted in evidence that she did not adjust her calculation in regard to the increase in the cost.

The comparison approach adopted by DW1 is an attractive argument, but no consideration was given to the fact that between 1993 and 2001 there could be many fluctuating market conditions that may well render the project a failure financially.

Both PW1 and DW1 admit that there would be a valid claim by the plaintiffs for loss of profit if the project had commenced in 1988. They differ only in the amount of profit. Notwithstanding the fact that both PW1 and DW1 gave evidence that there would be a valid claim by the plaintiffs for loss of profit if the project commenced in 1988, in terms of experience, PW1 had more practical experience of the housing industry than DWl. Having seen and heard both PW1 and DW1 giving evidence in Court, I prefer the testimony of PW1 to that of DW1, although in my assessment of his evidence, I have made some allowances for errors in the estimated profit.

The Court is entitled to consider the fact of loss of profit suffered by a party to a contract in suitable circumstances. This principle of law was illustrated amply in the recent case of *Bank Bumiputra Malaysia Berhad v. Mae Perkayuan Sdn Bhd*. [1993] 2 MLJ 76. In this case, the respondent had obtained overdraft facilities from the appellant for the purpose of a bridging loan in order to develop a certain piece of land in Dungun, Terengganu, and also to purchase a certain piece of land in Alor Gajah, Melaka. The appellant withdrew these loan facilities and sued the respondent for the payment of outstanding monies due to the bank. The respondent counter-claimed for breach of contract and damages.

In the course of the hearing of the *Bank Bumiputra* case, the respondent adduced

evidence to show that in the Dungun project the respondent would have made a certain amount of profit, and the Court assessed the amount of profit at RM5,394,722. The Court also held that on the facts and evidence, the loss of profits which the first respondent would suffer on the Dungun project was a natural and probable result of the appellant's breach of contract. The Court held that it was clear that at the time of entering into the loan contract with the first respondent, the appellant knew of the loss which would be incurred by the first respondent should the bank breach the contract.

In the instant case, the facts are somewhat similar to the *Bank Bumiputra* case. The defendants knew at the time the contract was executed that if there was a breach of contract and they did not honour their undertakings, the plaintiffs would suffer a loss, as the land had been purchased with a view to developing it into a housing project. The loss suffered by the plaintiffs was a natural and probable result of the defendant's breach of the contract.

I do have to bear in mind that in the Bank Bumiputra's case the project was already in progress when the loan was stopped, and in the present case it was not so. The commencement of the project depended entirely on the first defendant who was to provide the loan, and the profits expected were projections which may or may not have adversely affected the anticipated profits. Therefore this factor should be borne in mind in my assessment of the damages.

There have been two different computations in regard to the loss of profits made by PW1 and DW1. Taking all factors into consideration I take an average of the two figures relating to the basis that the project started in 1987/88. The average of the two figures relating to the loss of profits amounts to RM19,113,500. However, there could be adverse conditions affecting the anticipated profits and a deduction of a reasonable percentage of 30% should be applied to the sum which is thereby reduced to a round figure of RM13.5 million. I accordingly award the plaintiffs a sum of RM13.5 milion as damages for loss of profits.

The next item of loss claimed by the plaintiffs is loss of opportunity cost. Both PW1 and DW1 agreed that it was reasonable to assume that there was an increase in the value of properties in regard to this item. In regard to cash flow investment, both PW1 and DW1 agreed that there was such a loss. PW1 had stated that the loss would amount to RM1,410,900, where else DW1 stated that it would amount to RM325,028. In the circumstances, the average of the two figures would amount to RM867,969. I would therefore allow the sum of RM867,969 in regard to the item of loss suffered in regard to cash flow investment. On the evidence before me there is no basis for the other claim under the heading of loss of opportunity cost of RM2,869,300. I accordingly disallow this item.

In regard to the claim of future profit, this really amounts to a claim for exemplary damages against the defendants. The principles for an award of exemplary damages appear in the case of *Rookes v. Barnard* [1974] AC 1129. In the instant case, the plaintiffs have not established their claim in accordance with these principles. I therefore disallow the claim of RM5,000,000.

The plaintiffs also made a claim for interest on the amount of RM4,793,995.80. This amount was the 10% deposit paid by the plaintiffs to the defendants in compliance with the terms and conditions of the agreement for sale. It was argued by the plaintiffs' Counsel that the defendant had terminated the agreement without any legal basis, and this was so held by the Court. As such, the plaintiffs had been denied the use of that sum of money. It was further argued that the second defendant had the use of the money since 20 August 1984 until 31 December 1992 and the forfeiture of the said money by the defendants was unjustified. The defendants by wrongfully terminating the agreement must in all fairness compensate the plaintiffs. The plaintiffs' claim 8% interest per annum on the 10% of the purchase price of the land paid to the defendants on 20 August 1984 [date of the agreement] to 31 December 1992 [when the plaintiffs paid the balance of the purchase price]. However, I hold that the plaintiffs' claim for interest of 8% per annum on the 10% of the purchase price should commence from the date the agreement was wrongfully terminated i.e. 12 December 1988 till the balance of the purchase price was paid by the plaintiffs to the defendants on 31 December 1992. This figure amounts to RM1,756,772.91 arrived at as follows:

Deposit of RM4,793,995.80 paid on 20 August 1984.

Date of termination 12 December 1988.

Calculation of interest at 8% per annum.

	Principal	*Interest*	*Total*
12 December 1988	4,793 995.80	383,519.66	5,177,515.46
12 December 1989	5,177,515.46	414,201.23	5,591,716.69
12 December 1990	5,591.716.69	447,337.33	6,039,054.02
12 December 1991	6,039,054.02	483,124.32	6,552,178.34
12 December 1992] 31 December 1992]	6,552,178.34	28,590.37	6,550,768.71
The total interest	[6,550,768.71 - 4,793,995.80] =		1,756,772.91

I would accordingly allow damages under this item for the sum of RM1,756,772.91.

The defendants also called DW2 who is a Chartered Valuation Surveyor. The gist of his evidence is that the value of the said land in 1988 was RM54 milion, and the present day value of the land is RM120 million. He also submitted a report marked D6. Counsel for the defendants submitted that as such the plaintiff would have made a profit beyond the amount claimed by them by way of damages. He was shown a document D5 which stated that the valuation of the land by the Goverment in 1993 was RM67 milion. DW2 in his report D6 at page 2 stated categorically that he based his open market value of the land in question on the folowing **assumptions** that:

(i) a willing seller and a willing buyer dealing at arm's length;
(ii) a reasonable period within which to negotiate the sale, taking into account the nature of the property and the state of the market;
(iii) values will remain static throughout the period of negotiation for sale;
(iv) the property will be freely exposed to the market;
(v) no account is to be taken of an additional bid by a special purchaser.

It is my view that the evidence of DW2 is based on a series of assumpations. Therefore, there is no degree of certainty that the value of the land stated by him can be arrived at on a reasonable and factual basis. When a witness starts to assume certain facts to be prerequisite before arriving at a conclusion then his evidence cannot be accepted on the basis that it is reasonable and credible.

First of all is there any credible evidence on record that there is a willing buyer for the said land. We are not discussing the sale of small parcel of land, but that of a large parcel of land, amounting to 1000 acres. No evidence was adduced by the defendants that there was a ready or prospective purchaser of the said land for a price of RM120 million.

DW2 went on to state that he also assumed that values would have to be static throughout the period of negotiation for the sale of the land. Again this assumpation by him is not without a flaw. What if the value of the land is reduced drastically due to circumstances and market conditions. Again DW2 bases his opinion on the sale of certain pieces of land in 1991 namely items 3 and 4 of Schedule III of his report D6. The market conditions could vary in August 1993 by the time DW2 gave evidence in Court.

It is admitted that value of the said land would have appreciated between 1984 and 1992 but there is no cogent evidence before the Court as to the actual extent of the increase in the value of the said land. That leaves the Court to speculate on the increased value of the land. To do so would be totally unsatisfactory, bearing in mind that there was no evidence before the Court of the fact that there were any prospective purchasers for the said land. Therefore, in conclusion, I wish to state that the defendants' submission that the increase in the value of the said land would offset any damage suffered by the plaintiffs is not supported conclusively by the evidence of DW2 for reasons mentioned above.

It must be borne in mind that the plaintiffs purchased the piece of land for the purpose of development, and not for sale. This has been made clear in the agreement made by the plaintiffs and the defendants.

In any event, the defendants are inconsistent in their stand. Having stated that if the plaintiffs had developed the land in 1993 it would be profitable for the plaintiffs, they also state that the plaintiffs could also sell that land to offset their loss of profits. This shows that the defendants themselves are uncertain as to what course of action the plaintiffs should take.

Lastly, I award in favour of the plaintiffs interest at the rate of 5% per annum on all the awards of damages [except for the sum of RM1,756,772.91] for a period from the date of service of the writ until the date of judgment under s. 11 of the Civil Law Act 1956 and thereafter at the rate 8% per annum until

satisfaction under O. 42 r. 12 of the Rules of the High Court 1980.

I also award in favour of the plaintiffs the costs of the action to be taxed by the Senior Assistant Registrar in default of agreement between the parties.

PUBLIC FEEDMILL (M) SDN. BHD. (IN LIQUIDATION)

v.

HAI YEU HIN

HIGH COURT, KUALA LUMPUR
DATO' V.C. GEORGE J.
[CIVIL SUIT NO D3-23-2633-88]
22 FEBRUARY 1994

PRACTICE & PROCEDURE: Appeal to the Judge in Chambers - Order 56 r. 1 Rules of the High Court 1980 - Notice of hearing of appeal - Whether hearing to be fixed within five days of decision of Registrar.

PRACTICE & PROCEDURE: Appeal to the Judge in Chambers - Notice of hearing of appeal - Service - Notice issued within prescribed time but served seven months after the date fixed for hearing appeal - Whether appeal properly "brought" before the Court - Order 56 r. 1(2) Rules of the High Court 1980.

PRACTICE & PROCEDURE: Appeal - Issue and service of notice of appeal - Whether adjourment of hearing of appeal had the effect of nullifying notice and extending date of service thereof - Order 56 r. 1(3) Rules of the High Court 1980.

The plaintiff appealed to the Judge in Chambers against the decision of the Senior Assistant Registrar (SAR) in which the plaintiff's application under O. 14 Rules of the High Court 1980 (RHC) was dismissed. A preliminary objection was taken by the respondent to the effect that the appeal herein was not properly before the Court as the notice of appeal issued under O. 56 r. 1 RHC had not been served within the stipulated time. Order 56 r. 1(3) provides that unless otherwise ordered the notice of appeal must be issued within five days after the judgment order was made and served not less than two days before the day fixed for hearing the appeal.

The facts showed that the day fixed for hearing the appeal, specified as the returnable date in the notice of appeal, was 12 October 1992. What happened was that on that day the plaintiff informed the Court that service of the notice had not been effected on the respondent whereupon the matter was adjourned to 8 February 1993, on which date it was again adjourned to 8 June 1993, also because of non-service. It was not until 5 May 1993, i.e some seven months after the date fixed for hearing the appeal, that the